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IN THE SUPREME COURT OF THE STATE OF FLORIDA

BERNARD DOUGHERTY,

Petitioner,

v.

Case No. SC12-2365
5th DCA No. 5D10-2755

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

The record reflects that Bernard Dougherty, a/k/a David Ozolina, a/k/a David Palmer, was initially found to be incompetent[1] at a hearing held on August 21, 2002. (R 82, 123, 124, 278). Dougherty was committed to the Department of Children and Families for treatment. (R 125-126).

In January 2003, the Court was notified by the Department of Children and Families that Dougherty no longer met the criteria for continued commitment, and he was transported back to the county jail in February. (R 138). The trial court entered an order to transport and notice of competency hearing. (R 138, 141). On February 28, 2003, Dougherty appeared before the court for a status hearing regarding competency, at which time defense counsel stated:

> Your Honor, this is Mr. Dougherty who just returned from the State Hospital. This would be a comp review.
>
> Apparently, the hospital feels Mr. Dougherty is capable of going forward and we would request that since they feel he's capable of going forward, I talked to Mr. Dougherty briefly this morning, and he feels he's ready to go forward. We would like to have this set for the next docket sounding.
>
> THE COURT: State?
>
> THE STATE: April 21st.

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[1]Drs. William Riebsame, Howard Bernstein, and Burton Podnos, were appointed to evaluate Dougherty. (R 114).

> THE COURT: Set for docket sounding then on April 21st as requested.

(R 143, 886).

On July 10, 2003, defense counsel filed a "Motion to Determine Defendant's Competence," requesting Drs. Howard Bernstein, David Greenblum, and William Riebsame be appointed for the evaluation. (R 150). The trial court appointed the three named experts to evaluate Dougherty and set the matter for a hearing on September 10, 2003. (R 151-154). At the September 10, 2003, hearing, defense counsel stated that they had received the evaluations from the three doctors and that they would stipulate that Appellant was competent to proceed. (R 837). The trial court stated, "[v]ery good. We'll just put it on the regular docket sounding then." (R 837). While the court minutes reflect a finding that "Def. is competent to proceed," the trial court did not sign the court minutes. (R 157-158).

Trial was held on February 24, 2004. (R 170-183). The jury found Dougherty guilty of resisting an officer with violence and acquiring a controlled substance by fraud. (R 185-186).

Dougherty alleged at the July 2, 2010, re-sentencing hearing that he was and has been incompetent since before his trial. (R 803). Dougherty alleged that he had never been evaluated and he did not have a hearing regarding his competency. (R

803). The State responded that Dougherty was committed as incompetent in 2003, subsequently determined competent in February 2003, and returned from the state hospital. (R 803). Three experts were appointed and a competency hearing was held on September 10, 2003. (R 803). The prosecutor advised that all three doctors found Dougherty competent and that the defense stipulated to the reports. (R 804). The prosecutor indicated that the court found Dougherty competent and that the case then proceeded to a jury trial. (R 804). Defense counsel responded to the State's representations that Dougherty was asserting: "that he did not have his hearing as to his competency, and that he said that the reports were entered into, and that the reports are what the judge used in making his determination, that he didn't have a hearing." (R 804). The court indicated that it would re-schedule the resentencing hearing to allow Dougherty to file any motions he wanted to file. (R 806). The record does not indicate Dougherty ever filed any additional motions.

On July 23, 2010, Dougherty again appeared before the court for re-sentencing. (R 4). Defense counsel requested a continuance regarding the previously raised competency issue, which was denied by the court without prejudice for counsel to later file an appropriate motion. (R 10). During the State's rendition of Dougherty's procedural history, the State represented that the three doctors had agreed that Dougherty was "feigning incompetence." (R 17-19). Dougherty was re-sentenced. (R

22).

At the August 11, 2010, hearing, defense counsel again raised the competency issue. (R 818). Defense counsel did not seek a ruling, but instead asserted that it was an issue the defense would have to present to the District Court of Appeal. (R 818).

Dougherty raised the issue of his competency on appeal. *Dougherty v. State,* 96 So. 3d 984 (Fla. 5th DCA 2012). The Fifth District Court of Appeal rejected Dougherty's contention that he did not receive a proper and sufficient competency hearing, holding, "[i]t is apparent from the record that the trial court found Appellant competent to proceed based upon the representation and stipulation of defense counsel." *Id.* at 985. The Fifth District Court further rejected Dougherty's assertion that his competency hearing was insufficient, holding, "[b]ecause Appellant stipulated to the written reports at a properly scheduled competency hearing, the trial court was authorized to base its competency finding on the written reports." *Id.* The Fifth District Court remanded the cause for entry of a *nunc pro tunc* written order. *Id.*

Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court alleging conflict with *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009). This Court accepted jurisdiction and appointed Dougherty counsel.

SUMMARY OF ARGUMENT

It remains the position of the State that there is no express and direct conflict between *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009), and *Dougherty v. State*, 96 So. 3d 984, 985 (Fla. 5th DCA 2012). There is no conflict in the law. The caselaw indicates that once a defendant is declared incompetent, the defendant must be given proper notice and an opportunity to be heard at a meaningful time and in a meaningful manner before the trial court can determine that the defendant's competency has been restored. This determination can be made based on stipulation to the written reports of the experts. Here, Dougherty was given proper notice and an opportunity to be heard regarding the restoration of his competency, thus satisfying procedural due process. Counsel stipulated to the reports. The Fifth District Court of Appeal properly affirmed and remanded for a *nunc pro tunc* written order by the trial court declaring Dougherty to be competent.

ARGUMENT

NOT ONLY IS THE OPINION IN *MACALUSO* NOT IN EXPRESS AND DIRECT CONFLICT WITH *DOUGHERTY*, BUT THE FOURTH DISTRICT HAS SINCE FURTHER CLARIFIED ITS POSITION TO BE IN CONFORMANCE WITH THIS COURT, THE FIFTH DISTRICT, AND OTHER DISTRICT COURTS OF APPEAL.

While acknowledging this Court's decision to accept jurisdiction in this case, it remains the position of the State that there is no express and direct conflict on the face of the decision under review. Petitioner sought discretionary review based on conflict with *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009). However, since this Court accepted jurisdiction, the Fourth District Court clarified its ruling in *Macaluso*. In *Jones v. State*, 38 Fla. L. Weekly D 1349 (Fla. 4th DCA June 19, 2013), the Fourth District explained that *Macaluso* simply recognizes that Rule 3.212 "does not sanction stipulations to the ultimate issue of competency." *Id.* The Fourth District further explained that the holding in *Macaluso* relied on *Sampson v. State*, 853 So. 2d 1116, 1117 (Fla. 4th DCA 2003), but that in *Sampson* the trial court did not hold *any* degree of hearing. *Jones, supra.* The holding in *Dougherty*, by the Fifth District, was that "[b]ecause Appellant stipulated to the written reports at a properly scheduled competency hearing, the trial court was authorized to base its competency finding on the written reports." *Dougherty v. State*, 96 So. 3d 984, 985 (Fla. 5th DCA 2012).

Based on the Fourth District's interpretation of its own case law, no conflict exists between *Macaluso* and *Dougherty.*

Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." It was "never intended that the district courts of appeal should be intermediate courts." *Jackson v. State*, 926 So. 2d 1262, 1266 (Fla. 2006)(citing *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980). Rather, the function of the Florida Supreme Court is "a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice." *Id.*, citing *Jenkins*, 385 So. 2d at 1357-58. As explained by the *Jones* court, the decision in *Macaluso* is not in express and direct conflict with the case law of this Court or with *Dougherty*, rather, *Macaluso* simply inartfully states that the ultimate issue of competency is left to the trial court's determination.

In fact, this clarified holding is consistent with the rule of law in Florida and the holding of the Fifth District Court. In *Alexander v. State*, 380 So. 2d 1188, 1190 (Fla. 5th DCA 1980), the court explained that an incompetent defendant cannot waive a competency hearing because he is not competent to do so. However, as this Court

and several district courts have held, the parties can stipulate to a competency determination solely based on the reports filed by the experts. *See Fowler v. State*, 255 So. 2d 513 (Fla. 1971); *Jones v. State*, 38 Fla. L. Weekly D 1349 (Fla. 4th DCA June 19, 2013)(after the parties stipulated to the reports, the reports became the evidence upon which the trial court relied to decide the ultimate issue of competency); *Molina v. State*, 946 So. 2d 1103 (Fla. 5th DCA 2006)(noting that it is appropriate for the trial court to consider only the reports to determine the defendant's competency at a hearing following a period of incompetency so long as the parties agree); *Jackson v. State*, 880 So. 2d 1241 (1st DCA 2004)(trial court failed to conduct proper hearing where the record is devoid of any evidence that the parties agreed to a competency determination based solely on the reports); *Green v. State*, 598 So. 2d 313 (Fla. 2d DCA 1992)(in *Fowler* Supreme Court sanctioned a procedure to determine competency based on written reports); *Wells v. State*, 417 So. 2d 772 (Fla. 3d DCA 1982)(it is clear that when the parties agree, the trial court may decide the issue of competency on the basis of written reports.). In determining the requirements of a competency hearing, this Court has held that "[p]rocedural due process .... requires adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Jones v. State*, 740 So. 2d 520 (Fla. 1999)(quoting *Boddie v. Connecticut*, 401 U.S. 371 (1971). Nothing requires the trial court, the State, or the

defense to call any witnesses at the hearing, to present any evidence, or to make any arguments.

The State asserts that such is what happened in the instant case; the requirements of procedural due process were met. Dougherty was initially declared incompetent and sent to the state mental hospital. The hospital filed a report indicating that Dougherty's competency had been restored. The Rules of Criminal Procedure set forth the requirements for the evaluation reports filed by the Department of Children and Families and that the reports are to be served on all parties. *See* Fla. R. Crim. P. 3.212(5)(The report "shall address the issues and consider the factors set forth in rule 3.211, with copies to all parties."). After receiving such reports in this case at a properly scheduled competency hearing, defense counsel indicated that the doctors felt that Dougherty was competent and that Dougherty would like to move forward with the trial. The State did not object, and the trial court set the case for the next docket sounding, implicitly finding Dougherty competent.

Four months later, defense counsel filed a motion to determine competency. The trial court appointed the three experts requested by defense counsel, two of whom had originally concluded that Dougherty was incompetent. The trial court's order indicated that their reports should be served on the trial court, the State, and the

defense. The doctors filed their reports indicating that Dougherty was malingering, and the case was set for a competency hearing. At the hearing, defense counsel indicated that they had received the reports from the doctors and that the defense would stipulate to the findings, i.e., present no witnesses, evidence, or argument disputing the doctors' conclusions that Dougherty was malingering. The State did not dissent. The trial court the said "very good," (i.e., the defendant is competent) and put the case on the docket sounding.

While the trial court could have been more loquacious and explicitly found Dougherty competent based on the reports stipulated to by defense counsel, no magic words were required.[2] Procedural due process was satisfied in this case as Dougherty was given sufficient notice of the hearings, and was given an opportunity to be heard at a meaningful time and in a meaningful manner. Nothing in the record suggests that either side was prohibited from presenting any other evidence or arguments.

Finally, Dougherty argues that the Fifth District's holding, "[i]t is apparent from the record that the trial court found Appellant competent to proceed based upon the representation and stipulation of defense counsel," lacks textual support and lends

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[2]*Martinez v. State*, 851 So. 2d 832, 834 (Fla. 1st DCA 2003)(construing the lower court's statement "[a]ll right, sir" as a determination of competence and simply remanded for a written order finding, "we will not presume that the court acted contrary to the dictates of law by declining to make such finding once it was aware of the incompetency.")

itself to the conclusion that the trial court deferred its conclusion regarding Dougherty's competence to simply accepting the stipulation of defense counsel. However, a complete reading of the opinion explains that defense counsel was stipulating to the written reports and that, based on this stipulation, the trial court was authorized to base its competency determination based solely on the written reports. *Dougherty*, at 985.

The language in *Dougherty* is similar to that between defense counsel and the court found in *Green v. State*, 598 So. 2d 313 (Fla. 2d DCA 1992). In *Green*, the defendant was declared incompetent to stand trial. After the defendant was returned from the state hospital, the trial court appointed a single expert to evaluate the defendant. *Id*. At the scheduled hearing, defense counsel informed the trial judge that counsel had a report from the single appointed expert which indicated the defendant was competent to stand trial. *Id.* at 314. At that point in the proceedings, the trial judge announced: "It looks like we are ready to proceed on to trial." *Id.* Defense counsel responded: "Yes, sir." *Id.* The Second District Court affirmed, finding "[r]ather than interposing any objection to the procedure, it is clear from the transcript of the hearing that appellant acquiesced in the appointment of the single expert and in determining his competency at the hearing based upon the expert's written report."

Id.[3]

Additionally, the record herein shows that the doctors were ordered to provide the trial court with its own copies of their written reports.[4] This Court should not presume that the trial court acted contrary to the dictates of law by declining to review these written reports prior to making its determination.

Based on the foregoing facts and authorities, it remains the State's position that there is no express and direct conflict between *Dougherty* and *Macaluso*. Therefore this Court should dismiss this case as improvidently granted.

If this Court retains jurisdiction, this Court should affirm the decision of the Fifth District Court as consistent with the requirements of procedural due process, i.e., that a hearing requires notice to the defendant and a meaningful opportunity to be heard. This Court should find *Macaluso* to be an overly broad statement of the law as it requires testimony to be presented, even when the findings are undisputed, and does not allow for the limited hearing provided by this Court in *Fowler*.

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[3]In *McCray v. State*, 71 So. 3d 848, 861 (Fla. 2011), this Court also describes a similar set of circumstances: "the trial court conducted a second, brief competency hearing, during which the counsel for McCray and the State stipulated to the report's conclusions. **In light of this stipulation**, the trial court issued a verbal order finding that McCray's competency had been restored." (emphasis added).

[4]In *Macaluso* it is unclear whether the competency evaluations referenced by defense counsel were provided to all parties or whether they were privately obtained evaluations provided solely to defense counsel.

As a last point, the State would note if this Court rejects the State's position and deems reversal is mandated, Dougherty is still not entitled to a new trial. It is well settled that, in the appropriate case, *nunc pro tunc* proceedings can be conducted to determine competency. In reality, all this case is lacking is an order. In *Mason v. State*, 489 So. 2d 734 (Fla. 1986), this Court held that when evaluations had been previously completed, remand for a *nunc pro tunc* hearing was appropriate. *See also Nixon v. State*, 758 So. 2d 618 (Fla. 2000)(acknowledging a *nunc pro tunc* hearing could be conducted), *reversed on other grounds,* 543 U.S. 175 (2004). Given the facts of this case, that full competency evaluations were completed prior to trial and a hearing had begun, assuming the reports still exist and the experts are still available to testify, remand for completion of the hearing and a written order is the appropriate remedy in this case. *See Monte v. State,* 51 So. 3d 1196, 1203 (Fla. 4th DCA 2011)("[A] retroactive determination of competency may be possible and legally permissible because three pre-trial psychological evaluations have in fact already been performed and the records associated with those evaluations may remain available for review and consideration."). *See also United States v. Huston*, 821 F.2d 1015, 1018 (5th Cir. 1987)(the failure to make a competency determination does not automatically mandate a new trial).

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests this Honorable Court find that jurisdiction was improvidently granted or disapprove of the Court's holding in *Macaluso* as an overly broad statement of the law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been delivered via e-mail to Counsel for Petitioner Carlos F. Gonzalez and Paola Sanchez Torres, at cgonzalez@diazreus.com and psanchez@diazreus.com, this 30th day of August, 2013.

DESIGNATION OF EMAIL

I HEREBY DESIGNATE the following e-mail addresses for purpose of service of all documents, pursuant to Rule 2.516, in this proceeding:

crimappdab@myfloridalegal.com (primary), and
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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